



September 2, 2003

FILED ELECTRONICALLY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in CS Docket No. 97-80 and PP Docket No. 00-67

Dear Ms. Dortch:

This letter is submitted on behalf of Starz Encore Group LLC ("Starz Encore") regarding the Memorandum of Understanding between representatives of the cable television industry and the consumer electronics industry (the "MOU"), and the proposed digital plug and play encoding rules submitted to the Commission in the above-captioned proceedings.

In its comments in the captioned proceedings and its followup *ex parte* meetings, Starz Encore expressed its concern with the proposed copying security encoding rules set forth in the MOU, which would categorize Subscription Video-on-Demand ("SVOD") as a "Copy Never" service. Subscribers to Starz Encore's SVOD service pay a flat monthly fee (or have the service included with their monthly STARZ! subscription fee) to select premium movies from a large, rotating menu, and can watch those movies when they choose, as often as they want, with no per-view charge. In the case of Starz Encore, its SVOD service is not a new category of service but an extension and enhancement of its linear premium movie channels (Starz Encore's SVOD service is only available to subscribers to its linear service, STARZ!).

Classifying SVOD services such as Starz Encore's as a Copy Never service would be fundamentally at odds with the copying rules embodied in the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(k), and, critically, fair and legitimate consumer expectations. Although the DMCA was limited in scope to analog transmissions, the DMCA remains the latest pronouncement by Congress of its intent as to where copying should and should not be permitted, within the current limited home copying environment and expectations. The DMCA clearly reflects that the categorization of a programming service as Copy Once or Copy Never turns on the business model: how the programming is sold and paid for. As reflected in the clear language of the DMCA, pay-per-view and other per-use transactional video services are categorized as Copy Never services.¹ In contrast, subscription video services are explicitly

¹ See 17 U.S.C. § 1201(k)(2)(A) (Copy Never applies to programming consisting of a "single transmission, or specified group of transmissions, . . . for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions.") (Emphasis added).

categorized as Copy Once.² The MOU's copying rules, by placing the SVOD service in Copy Never, is thus a substantial departure from Congress's stated intentions as set forth in the DMCA. Instead, fashioning copying rules for SVOD that place SVOD in the Copy Once category would faithfully adhere to the DMCA and reflect reasonable and legitimate consumer expectations about what they can do with a particular kind of programming.

Starz Encore recognizes that HBO, another provider of SVOD services, has urged that it would like to have the flexibility to offer SVOD as Copy Never. HBO's desire for Copy Never treatment of SVOD appears based on its concern that some portion of the content that it makes available on its SVOD service, HBO On Demand ("HOD"), is HBO original programming that it also makes available for sale in the home video market. HBO worries that if SVOD is classified as a Copy Once service, transactional sales of its original programming in the home video market will be cannibalized by copying of the same content available on HOD (regardless of the fact that the same content is available to be copied once when it appears on the associated linear video channel, HBO). Like most copyright owners, HBO wants to prevent any copying of its programs, regardless of consumers' fair and legitimate home copying expectations. HBO, with representatives of its affiliated cable MSO (Time Warner) sitting at the CEA-NCTA negotiating table, was able to have its desired change in the copyright law implanted into the MOU in order to prevent its content from being copied.

As discussed above, HBO's concerns notwithstanding, the DMCA and consumer expectations require that SVOD be classified as Copy Once, particularly where, as is the case of Starz Encore SVOD, the SVOD service is an extension and enhancement of an existing linear programming service and carries programming drawn from that programming service. On the other hand, if a programmer creates an entirely new SVOD service with programming that is not on its linear programming service, and with programming that it otherwise makes available on a per transaction basis that is classified as Copy Never (i.e., through pay-per-view or the home video market), then it would be reasonable for that SVOD service to be viewed as an extension of the transaction-based service, and classified by the programmer as Copy Never.

Fashioning a rule for SVOD in this manner would be consistent with legitimate consumer expectations regarding the ability to make a single copy for personal use (just as can be done today and would be permitted under the encoding rules for other premium subscription cable programming services). In contrast, classifying all SVOD services as Copy Never would be inconsistent with the DMCA, would negatively impact subscribers' satisfaction with SVOD, and would ultimately threaten the development of the SVOD technology and its successful deployment. Moreover, as SVOD technology and deployment spread, more subscription video programming services can be expected to place even greater emphasis on their SVOD services, to the extent that in many cases, the SVOD services will effectively replace the traditional linear programming services. As such a transition occurs, if SVOD remains Copy Never, then

² See 17 U.S.C. § 1201(k)(2)(B) (Copy Once applies to programming "where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service.").

consumers will have lost all copying ability for the bulk of programming now on regular cable television services.

While the Commission is the appropriate arbiter of communications law in this complex arena, Congress has repeatedly cautioned that copyright law is Congress's exclusive domain under the U.S. Constitution. Throughout the history of cable television, the Commission has carefully avoided taking actions that could be construed as changing copyright law, deferring instead to Congress in this special area.³ Perhaps such involvement in copyright is appropriate in those cases where a Commission action could be construed as furthering the clear, previously decreed intent of Congress, but in the case of the classification of SVOD as Copy Never in the MOU's encoding rules, the Commission should refrain from changing the classification of a subscription video service like SVOD from Copy Once to Copy Never.

Please feel free to contact me, or our counsel, Martin L. Stern, at the numbers below if you have any questions regarding this matter.

Respectfully submitted,

STARZ ENCORE GROUP LLC

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³ See, e.g., Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 F.C.C.2d 580, ¶¶ 11-12 (1970) (finding that the "arena for definitive resolution of [the copyright] issue remains the Congress, not this Agency . . ." in declining to propose charges to be imposed on cable operators in connection with the importation of distant signals).

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cc: Chairman Michael K. Powell
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